Supreme Court, U.S.
FILED

(1)

No. 02 1603 APR 14 2003

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; JAMES PRICE, Superintendent of State Correctional Institution at Greene; RAYMOND J. COLLERAN, Superintendent of State Correctional Insitution at Waymart; COMMONWEALTH OF PENNSYLVANIA,
Petitioners,

v.

GEORGE E. BANKS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS W. DOLGENOS
Chief, Federal Litigation
RONALD EISENBERG
Deputy District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District
Attorney's Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

SCOTT C. GARTLEY
(Counsel of Record)
Assistant District Att'y
DAVID W. LUPAS
District Attorney

Luzerne County
District Attorney's Office
200 North River Street
Wilkes-Barre, PA 18711
(570) 825-1692

34 pp

QUESTIONS PRESENTED

1. Does this Court's decision in Mills v. Maryland, 486 U.S. 367 (1988), constitute a new rule of law that cannot be applied retroactively to award sentencing relief to a prisoner whose conviction became final before Mills was announced?

(Answered in the negative by the United States Court of Appeals for the Third Circuit.)

2. If Mills applies retroactively, where a state supreme court has rejected a Mills challenge because neither the trial court's instructions nor the verdict form advised the jury that it must be unanimous as to the existence of mitigating circumstances and, to the contrary, made clear that unanimity was required only to find aggravating circumstances and to impose a sentence of death, is that decision a reasonable application of this Court's precedent?

(Answered in the negative by the United States Court of Appeals for the Third Circuit.)

TABLE OF CONTENTS

ORDERS AND OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. The Circuits have split over the question of whether Mills v. Maryland announced a new rule of law that cannot be retroactively applied; this Court should grant certiorari to resolve the issue. 5

1. Mills announced a new rule. 8

2. The Mills rule does not qualify for retroactive application under one of the exceptions to Teague. 13

II. The Pennsylvania Supreme Court's rejection of the Mills claim was reasonable; this Court should grant certiorari to clarify the principle that habeas relief is available only where the state court is not only wrong, but also unreasonable. 15

CONCLUSION 26

TABLE OF AUTHORITIES

Federal Cases

Abdur'rahman v. Bell, 226 F.3d 696 (6th Cir. 2000) 19

Abu-Jamal v. Horn, 2001 WL 1609690 (E.D. Pa. 2001) 7, 20

Andres v. United States, 333 U.S. 740 (1948) 11

Banks v. Horn, 126 F.3d 206 (3d Cir. 1997) 4

Banks v. Pennsylvania, 484 U.S. 873 (1987) 3

Banks v. Pennsylvania, 516 U.S. 835 (1995) 3

Boyde v. California, 494 U.S. 370 (1990) 21, 22

Brown v. Lee, 319 F.3d 162 (4th Cir. 2003) 6

California v. Brown, 479 U.S. 538 (1987) 11

Coe v. Bell, 161 F.3d 320 (6th Cir. 1998) 24

Cordova v. Collins, 953 F.2d 167 (5th Cir. 1992) 5

Early v. Packer, 123 S. Ct. 362 (November 4, 2002) 16

Eddings v. Oklahoma, 455 U.S. 104 (1982) 9

Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997) 19

Gall v. Parker, 231 F.3d 265 (6th Cir. 2000) 6

Gideon v. Wainwright, 372 U.S. 335 (1963) 13

Gilmore v. Taylor, 508 U.S. 333 (1993) 8

Graham v. Collins, 506 U.S. 461, 478 (1993) 14

Griffin v. Delo, 33 F.3d 895 (8th Cir. 1994) 25

Hackett v. Price, 212 F. Supp.2d 382 (E.D. Pa. 2001) 7

Henry v. Horn, 218 F. Supp.2d 671 (E.D. Pa. 2002) 7

Hitchcock v. Dugger, 481 U.S. 393 (1987) 9

Holland v. Horn, 150 F. Supp.2d 706 (E.D. Pa. 2001) 7

Holloway v. Horn, 161 F. Supp.2d 452 (E.D. Pa. 2001) 7

Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc) 25

Laird v. Horn, 159 F. Supp.2d 58 (E.D. Pa. 2001) 7

Lambrix v. Singletary, 520 U.S. 518 (1997) 14

Lawson v. Dixon, 3 F.3d 743 (4th Cir. 1993) 25

Lockett v. Ohio, 438 U.S. 586 (1978) 8

Martin v. Ohio, 480 U.S. 228 (1987) 10

Maynard v. Dixon, 943 F.2d 407 (4th Cir. 1991) 25

McKoy v. North Carolina, 494 U.S. 433 (1990) 10, 11, 13

Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995) 5

Mills v. Maryland, 486 U.S. 367 (1988) ..... i, 3, 5, 9

O'Dell v. Netherland, 521 U.S. 151 (1997) 8, 12, 14

Parker v. Norris, 64 F.3d 1178 (8th Cir. 1995) 24

Patterson v. New York, 432 U.S. 197 (1977) 10

Peterkin v. Horn, 179 F. Supp.2d 518 (E.D. Pa. 2002) 7

Rivera v. Delaware, 429 U.S. 877 (1976) 10

Saffle v. Parks, 494 U.S. 484 (1990) 10

Sawyer v. Smith, 497 U.S. 227 (1990) 8, 13, 14

Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000) 24

Skipper v. South Carolina, 476 U.S. 1 (1986) 9

Smith v. Dixon, 14 F.3d 956 (4th Cir.) (en banc) 25

Teague v. Lane, 489 U.S. 288 (1989) 5, 8, 13, 14

Williams v. Dixon, 961 F.2d 448 (4th Cir. 1992) 6

Williams v. Taylor, 529 U.S. 362 (2000) 16

Woodford v. Visciotti, 123 S. Ct. 357 (November 4, 2002) 16

Woodson v. North Carolina, 428 U.S. 280 (1976) 11

Yarris v. Horn, 230 F. Supp.2d 577 (E.D. Pa. 2002)..... 7

Zettlemoyer v. Fulcomer, 923 F.2d 284 (3d Cir. 1991)..... 18

State Cases

Commonwealth v. Banks, 521 A.2d 1 (Pa. 1987) 3

Commonwealth v. Banks, 656 A.2d 467 (1995) 3, 23, 24

Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999) 4

Commonwealth v. Breakiron , 729 A.2d 1088 (Pa. 1999) .. 20

Commonwealth v. Chester, 733 A.2d 1242 (Pa. 1999) 20

Commonwealth v. Cross, 726 A.2d 333 (Pa. 1999) 6, 20

Commonwealth v. Frey, 554 A.2d 27 (Pa. 1989) 23

Commonwealth v. Hackett, 627 A.2d 719 (Pa. 1993) ... 22, 23

Commonwealth v. Laird, 726 A.2d 346 (Pa. 1999)..... 20

Commonwealth v. Marshall, 633 A.2d 1100 (Pa. 1993) 22, 23

Commonwealth v. O'Shea, 567 A.2d 1023 (Pa. 1989) .. 22, 23

State v. Zuniga, 444 S.E.2d 443 (N.C. 1994) 6

Federal Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) 2

State Statutes

42 Pa. C.S.A. §§ 9541 3

Md. Ann. Code, Art. 27, §413(g)..... 9

ORDERS AND OPINIONS BELOW

The United States Court of Appeals for the Third Circuit originally granted Banks' Petition for Writ of Habeas Corpus, and ordered a new sentencing hearing, on October 31, 2001. App. 72-120. The basis of this ruling was a perceived violation of Mills v. Maryland. On June 17, 2002, this Court reversed the judgment in a *per curiam* opinion, remanded the matter, and directed the Third Circuit to decide the question of whether the Mills rule can be applied retroactively. App. 60-68. On January 14, 2003, the Third Circuit held that Mills should be applied retroactively; the court's latest judgment and opinion is reported at 316 F.3d 228 (3d Cir.), and is reprinted in the Appendix at App. 1-57. The panel also re-adopted its earlier holding on the merits. App. 38. The August 18, 1999, order of the district court denying the petition for writ of habeas corpus is reported at 63 F. Supp.2d 525 (M.D. Pa.), and is reprinted in the Appendix at App. 129-176.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit dated January 14, 2003, reversing the order of the district court, and granting the writ as to sentencing. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;...

STATEMENT OF THE CASE

This petition presents yet another stage of litigation for one of the most notorious murderers in Pennsylvania history. His guilt has never been in doubt. On September 25, 1982, George Banks murdered thirteen people in an armed rampage in Wilkes-Barre, Pennsylvania. Seven of his victims were children, including five of his own. Banks admitted the killings in several statements to police. At trial, he took the stand and admitted shooting most of the victims; however, Banks claimed that the police had framed him for

the *other* murders, which the police themselves had supposedly committed.

On June 21, 1983, a Luzerne County jury rejected Banks' fanciful conspiracy theory and convicted him on twelve counts of first-degree murder, and one count each of third-degree murder, attempted murder, aggravated assault, recklessly endangering another person, robbery, and theft of a motor vehicle. Following the penalty phase of the trial, the same jury sentenced Banks to death on each of the twelve counts of first-degree murder. He received an additional aggregate sentence of twenty-five to fifty years in prison on the other convictions.

Afterwards began an odyssey of appeals and collateral review that has now lasted almost two decades. The Pennsylvania Supreme Court first affirmed Banks' conviction on direct appeal in 1987, see Commonwealth v. Banks, 521 A.2d 1 (Pa. 1987), and this Court denied *certiorari*, see Banks v. Pennsylvania, 484 U.S. 873 (1987). Banks then sought collateral relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541 *et seq*. One of the claims raised in this first PCRA petition is at issue here: Banks claimed for the first time that his sentencing instructions violated Mills v. Maryland, 486 U.S. 367 (1988). The PCRA trial court rejected this argument, as well as Banks' other claims. This denial of collateral relief was affirmed by the Pennsylvania Supreme Court. Commonwealth v. Banks, 656 A.2d 467 (1995). This Court again denied *certiorari*. Banks v. Pennsylvania, 516 U.S. 835 (1995).

Banks' first federal habeas petition was dismissed without prejudice so that Banks could pursue additional state

remedies. Banks v. Horn, 126 F.3d 206 (3d Cir. 1997). The state courts, however, found that Banks' second PCRA petition was time-barred under the 1996 amendments to the PCRA. Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999). Governor Thomas Ridge signed a death warrant -- Banks' second -- on March 9, 1999; petitioner returned once again to federal court. This time, the district court denied the petition on the merits. Banks v. Horn, 63 F. Supp.2d 525 (M.D. Pa. 1999), App. 129-176, *reconsideration denied*, App. 121-128.

On appeal, the Third Circuit reversed and granted Banks a new sentencing hearing based on the Mills claim. 271 F.3d 527 (3d Cir., Oct. 31, 2001), App. 72-120. The panel refused to consider whether Mills could properly be applied retroactively to older convictions like this one, because the state court had not addressed the retroactivity issue. App. 98-104. After rehearing was denied, this Court granted the Commonwealth's Petition for Writ of *Certiorari*, and simultaneously issued a *per curiam* opinion reversing the judgment. The Court explained that federal habeas courts *must* decide the retroactivity question when properly raised by the state, and directed the Third Circuit to do so. App. 62-68. This Court also noted that the Federal Circuits are split on the question of whether Mills is retroactive. App. 66 & n.4.

Both parties filed supplemental briefs in the Court of Appeals on the retroactivity question, and several months later the Third Circuit issued its latest opinion, holding that Mills did not create a new rule and therefore can be retroactively applied to this case. App. 1-38. Two judges joined the opinion of the court; the third member of the panel, the Honorable Delores K. Sloviter, filed a separate concurring opinion. Judge Sloviter opined that Mills was

indeed a new rule, and normally it should not be retroactively applied under Teague v. Lane, 489 U.S. 288 (1989). Nevertheless, despite this Court's clear instruction that Teague *must* be applied when properly raised by the state, Judge Sloviter wrote that Teague should *not* be applied where, as here, the state courts have reached the merits of the underlying claim. App. 39-57.

REASONS FOR GRANTING THE WRIT

I. The Circuits have split over the question of whether *Mills v. Maryland* announced a new rule of law that cannot be retroactively applied; this Court should grant *certiorari* to resolve the issue.

The Third Circuit granted sentencing relief to Banks based on an alleged violation of Mills v. Maryland, 486 U.S. 367 (1988). The problem is that Banks' judgment became final in 1986, before Mills was decided. This Court has explained that new rules of constitutional law generally cannot be retroactively applied. See Teague v. Lane, 489 U.S. 288 (1989) (announcing rule of non-retroactivity). After first refusing to consider the question, the Third Circuit has now held that Mills did not announce a new rule, and therefore it does not implicate the rule against retroactivity. This decision has deepened an already existing Circuit split.

This Court already noted the split when it remanded this case last year. App. 66 & n.4. Compare Miller v. Lockhart, 65 F.3d 676, 685-86 (8th Cir. 1995) (Mills announced new rule of law that, per Teague, could not be applied retroactively on collateral review), and Cordova v. Collins, 953 F.2d 167, 173 (5th Cir.) (same), cert. denied, 502

U.S. 1067 (1992), with Gall v. Parker, 231 F.3d 265, 322 (6th Cir. 2000) (Mills did not announce new rule of constitutional law so as to bar retroactive application under Teague), cert. denied, 121 S. Ct. 2577 (2001), and Williams v. Dixon, 961 F.2d 448, 456 (4th Cir. 1992) (although Mills announced new rule, it qualifies under second Teague exception permitting retroactive application), cert. denied, 506 U.S. 991 (1992). Similarly, state courts have come to differing conclusions on the Mills/Teague issue. Compare Commonwealth v. Cross, 726 A.2d 333, 338 n.4 (Pa. 1999) (Mills not retroactive under Teague) with State v. Zuniga, 444 S.E.2d 443, 446-47 (N.C. 1994) (Mills properly applied retroactively).

These cases demonstrate a deep uncertainty, not only about the retroactive application of Mills, but also about the proper application of Teague in general. The courts cannot agree on what makes a rule "new" so as to trigger the rule of non-retroactivity, or what makes a rule so fundamental as to overcome the Teague bar. Even the three Third Circuit judges who decided this case were unable to agree on a theory of Mills retroactivity. Compare Opinion of the Court (Rendell, J., with Roth, J.) (Mills not new rule under Teague) (App. 1-38), with Concurring Opinion (Sloviter, J.) (Mills is a new rule that usually should not be applied retroactively, but where the state courts address the merits of the Mills issue by relaxing their rules of waiver on collateral review, no Teague analysis is necessary) (App. 39-57).

The Mills/Teague issue is a critically important Circuit split. Even now, years after Mills was decided, older capital cases raising questions of Mills retroactivity continue to find their way to the federal courts. See, e.g., Brown v. Lee, 319 F.3d 162, 168 (4th Cir. 2003) (notes that Fourth Circuit has decided that Mills applies retroactively; remands

for consideration of Mills claim after finding procedural bar inadequate). Here in Pennsylvania, this question is especially important. The jury instructions at issue in this case were standard in this Commonwealth for years -- as the state Attorney General noted in his *amicus* brief before the Third Circuit, the panel's merits decision "will directly impact at least thirty cases" currently making their way through the state and federal courts. App. 178. In many of these cases, the Attorney General explained, the judgments were final before Mills was decided, and so the question of retroactivity is directly at issue. App. 179-180 & n.4.

The Attorney General's prediction is coming true: The federal courts in this Circuit have, through their Mills analysis of this once-standard instruction, effectively nullified every death penalty imposed in Pennsylvania before approximately 1989. See Henry v. Horn, 218 F. Supp.2d 671, 686-90 (E.D. Pa. 2002); Peterkin v. Horn, 179 F. Supp.2d 518, 522 (E.D. Pa. 2002); Laird v. Horn, 159 F. Supp.2d 58, 107-108 (E.D. Pa. 2001); Abu-Jamal v. Horn, 2001 WL 1609690, *114-126 (E.D. Pa. 2001). See also Hackett v. Price, 212 F. Supp.2d 382, 403-411 (E.D. Pa. 2001) (decided before Third Circuit issued Banks opinion; granted relief on Mills challenge to similar instructions; currently pending on appeal); Holloway v. Horn, 161 F. Supp.2d 452, 579-80 (E.D. Pa. 2001) (denying Mills challenge to similar instructions; Third Circuit granted certificate of appealability on Mills issue, appeal currently pending); Holland v. Horn, 150 F. Supp.2d 706, 756-62 (E.D. Pa. 2001) (denying relief on Mills issue; petition for certificate of appealability pending in Third Circuit). Many more cases await decision. See, e.g., Yarris v. Horn, 230 F. Supp.2d 577, 590-91 (E.D. Pa. 2002) (finding Mills issue reviewable despite Yarris's failure to abide by state deadline

for collateral review; court will decide issue in subsequent decision).

1. Mills announced a new rule.

The Mills/Teague inquiry depends, first, on whether Mills announced a new rule of law: that is, whether its holding was "dictated by precedent" existing at the time that Banks' conviction became final. Teague, 489 U.S. at 301. The "new rule" requirement is designed to prevent second-guessing of "reasonable, good faith interpretations of existing precedents made by state courts." Teague, 494 U.S. at 414; see also Gilmore v. Taylor, 508 U.S. 333, 339-40 (1993). If the state court's decision was reasonable in light of then-current law, it should be respected; only where the state court ignored *clear* precedent that *dictated* the contrary result, should its conclusions be re-visited. See also O'Dell v. Netherland, 521 U.S. 151, 164-66 (1997) (rule is new, even when foreshadowed by prior precedent, if it was susceptible to debate among reasonable jurists); Sawyer v. Smith, 497 U.S. 227, 234-36 (1990) (purpose of Teague is to prevent disruption of final judgments by "gradual developments in the law," which should be viewed as "new").

Under this standard, the Mills rule was new – its holding was by no means a foregone conclusion in 1987, and indeed it marked a significant leap from prior precedent. This Court first held in Lockett v. Ohio, 438 U.S. 586, 604 (1978), that a capital sentencer must be allowed to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Although Lockett was a plurality opinion, this Court applied its holding several times over the next few years. In each

case, the Court reversed a death sentence where the sentencer had been *entirely precluded* from considering a category of appropriate mitigating evidence. First, in Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), the Court invalidated a death sentence where the sentencing judge had stated that he could not consider the defendants' family background in mitigation "as a matter of law." Similarly, in Skipper v. South Carolina, 476 U.S. 1, 3 (1986), the jury had not been permitted to consider any evidence concerning the defendant's adjustment to prison. Finally, in Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987), neither the advisory jury nor the sentencing judge was permitted to consider evidence supporting non-statutory mitigating circumstances; thus, the evidence of the defendant's family background was ignored.

That was where the law stood at the time that Banks' conviction became final. Mills, decided the following year, addressed a different problem -- the question of unanimity. There was no dispute that the jurors in Mills could hear and consider any evidence of mitigation that the defendant chose to present. See Md. Ann. Code, Art. 27, §413(g) (allowing sentencer to find as mitigation "[a]ny other facts which the jury or the court ... finds as mitigating circumstances in the case"), quoted in Mills, 486 U.S. at 370 n.1. If, after having considered all of the evidence, the jurors unanimously agreed on the presence of a particular mitigating factor, then they could embark on a second step -- namely, weighing that mitigator against any aggravating circumstances proved by the state beyond a reasonable doubt. If the jury considered and *rejected* that mitigating evidence, that is, if the jurors could not unanimously agree that a particular mitigating factor was present, then that mitigating factor could not be part of the second-step weighing process.

The Mills rule thus goes beyond the principle that the jury must be allowed to consider mitigating evidence; Mills commands that *every* juror be allowed to consider *every* piece of potentially mitigating evidence at *every* point in the deliberative process. In doing so, Mills invalidated a state rule requiring juror unanimity -- the kind of rule that had once been entirely left to the states. See McKoy v. North Carolina, 494 U.S. 433, 467 (1990) (Scalia, J., dissenting) (noting that, before Mills, Court had never before invalidated a jury-unanimity requirement). Indeed, as the dissent in McKoy also noted, this Court had previously *approved* unanimity requirements in similar contexts. See Martin v. Ohio, 480 U.S. 228 (1987) (approving unanimity requirement as condition to establishing self-defense in capital murder case); Patterson v. New York, 432 U.S. 197 (1977) (as condition to establishing defense of extreme emotional disturbance in murder case); Rivera v. Delaware, 429 U.S. 877 (1976) (as condition to establishing defense of insanity in murder case).

While Lockett, Eddings, Skipper and Hitchcock certainly informed the Mills decision, those earlier cases did not make the Mills rule inevitable. Saffle v. Parks, 494 U.S. 484, 490 (1990) (Lockett and Eddings "do not speak directly, if at all, to ... *how* [the jury] must consider the mitigating evidence," as opposed to "*what* mitigating evidence the jury must be permitted to consider in making its sentencing decision.") (emphasis in original). In fact, at least four present Justices on this Court dispute that the outcome in Mills was even "controlled or governed" by Lockett and Eddings, let alone dictated by those earlier decisions. See McKoy, 494 U.S. at 452-56 (Kennedy, J., concurring); id. at

471 (Scalia, J., dissenting, with Rehnquist, C.J., and O'Connor, J.).

The Third Circuit's attempts to justify its "new rule" holding are remarkably weak. The panel reviewed Lockett, Eddings, Skipper, and Hitchcock, as well as several other of this Court's decisions, and concluded that "the result in Mills was obvious," App. 37, and indeed "no reasonable jurist could have reached a different result." App. 24.[1] This is

[1] The panel also found that the result in Mills had been dictated by three other cases – but none of these presented remotely the same issue. In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court held that the Eighth Amendment is violated by laws imposing a mandatory death penalty for broad categories of crimes, that is, where the sentencer is not allowed to consider any mitigating evidence at all. In California v. Brown, 479 U.S. 538 (1987), the Court approved an instruction to the sentencing jury not to base its verdict on "mere sympathy." 479 U.S. at 542. Finally, in Andres v. United States, 333 U.S. 740 (1948), a direct appeal of a federal criminal conviction, the Court interpreted a federal statute to require juror unanimity as a prerequisite to imposing the death penalty. 333 U.S. at 748-49. None of these cases suggest that Mills was inevitable.

Indeed, the Mills instructions could easily have been approved as a way to reconcile "the two central principles of our Eighth Amendment jurisprudence" described by these cases. Brown, 479 U.S. at 544 (O'Connor, J., concurring). On the one hand, this Court has warned against blanket exclusions of evidence relevant to mitigation; to that end, the Maryland scheme allowed consideration of all such evidence presented by the defendant. On the other hand, this Court has said that

(continued ...)

plainly untrue, as the dissent in McKoy makes clear. The earlier cases required that death penalty sentencers be allowed to consider all relevant mitigating evidence; they did not address the Mills issue of whether the states may create a capital sentencing scheme where *every* juror is free to consider *all* evidence presented in mitigation, but may weigh only those mitigators that are unanimously found. The Third Circuit also observed that Mills "is replete with references to controlling precedent," as if such references only occur in run-of-the-mill applications of old law. This Court has already rejected such a simplistic analysis. See O'Dell, 521 U.S. at 161 n.2 (Court's statement in Simmons v. South Carolina that its decision was "compel[led]" by earlier decisions, did not mean that rule was not "new"; "courts frequently view their decisions as being 'controlled' or 'governed' by prior opinions even when aware of reasonable contrary conclusions") (quotation omitted).

To be "dictated" by prior precedent, a rule must be logically *necessary* from the cases preceding it; where there is doubt, comity demands that state courts be given the benefit of that doubt, and their "good faith" decisions should be validated. Under this standard, Mills was clearly new.

unbridled juror discretion is also improper – so rather than allow the verdict to be controlled by one juror who sees mitigation where all others do not, the Mills instructions require unanimity. Mills eventually disapproved of this scheme, but its result does not mean this was not a good-faith attempt by Maryland to comply with complex death penalty jurisprudence.

2. The Mills rule does not qualify for retroactive application under one of the exceptions to Teague.

Because the Third Circuit found that Mills did not announce a new rule, it went no further in its Teague analysis. If this Court should find, however, that the Mills rule was indeed new, then the second Teague question must be answered – whether Mills nevertheless qualifies for retroactive application under one of the exceptions to Teague.

There are two such exceptions, but only one of these might be applicable to Mills. This is the so-called "second Teague exception;" as this Court has explained, "[a] rule that qualifies under this exception must ... 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242 (1990), quoting Teague, 489 U.S. at 311. By way of example, this Court has cited the rule of Gideon v. Wainwright, 372 U.S. 335 (1963) -- announcing the right of criminal defendants to be represented by counsel -- as the sort of "bedrock procedural element" that would qualify for retroactive application. Saffle, 494 U.S. at 495. The Court has also explained that this exception is "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus -- that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." Teague, 489 U.S. at 313.

On the other hand, this Court has also warned that the second Teague exception will be rare in application: "Whatever the precise scope of this exception, it is clearly meant to apply only to a small core of rules requiring

observance of those procedures that ... are implicit in the concept of ordered liberty." Graham v. Collins, 506 U.S. 461, 478 (1993) (internal quotations omitted). See also Teague, 489 U.S. at 313 ("we believe it unlikely that many such components of basic due process have yet to emerge."). Thus, this Court has held that a variety of new rules do not meet the second Teague exception. See, e.g., O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (rule of Simmons v. South Carolina, requiring that jury be instructed of defendant's parole-ineligibility if prosecution argues that he poses a future danger, not a watershed rule under Teague); Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997) (rule of Espinosa v. Florida, that if judge in "weighing" state is required to give weight to jury's sentencing recommendation then neither judge nor jury can consider invalid aggravating circumstance, does not qualify for second Teague exception); Graham, 506 U.S. at 478 (proposed new rule requiring special jury instruction concerning mitigating evidence would not qualify for Teague exception); Sawyer, 497 U.S. at 241-44 (rule of Caldwell v. Mississippi, that Constitution prohibits imposition of death sentence where sentencer has been led to believe that ultimate responsibility for determining appropriateness of punishment lies elsewhere, not "watershed rule" under Teague.)

The Mills rule does not meet this standard. It did not change the substance of what a capital jury must be allowed to consider – that had already been done, by Lockett and succeeding cases. Rather, Mills requires states to allow consideration of mitigating evidence in a later phase of deliberations, that is, when the jury determines the consequences of its having found aggravating circumstances. In other words, Mills regulates not *what* the jury can consider, but *how* it can consider it. This is not the sort of

bedrock procedural element that is equivalent to bars against a runaway mob, a prosecutor bent on framing an innocent man, a false confession resulting from torture, or a criminal trial without a defense lawyer.

For the purposes of this petition, the important point is that the Mills/Teague issue should be decided, one way or the other. There is a sharp judicial split of opinion on the issue, and the outcome of many older death penalty cases depends on its resolution. This Court should grant *certiorari* and review this critical question.

II. The Pennsylvania Supreme Court's rejection of the *Mills* claim was reasonable; this Court should grant *certiorari* to clarify the principle that habeas relief is available only where the state court is not only wrong, but also unreasonable.

If Mills is found to be retroactive, there is one more important issue to be resolved here -- the merits. The court below engaged in a textbook misapplication of the AEDPA standard of review when it considered the merits of Banks' Mills claim in its 2001 opinion. The panel explicitly re-instated this analysis in its latest opinion. App. 38. Unfortunately, such disregard of the AEDPA standard remains common among the lower federal courts. This Court should grant review to reaffirm the principle that reasonable state court opinions must be respected.

Earlier this term, this Court re-emphasized that AEDPA means what it says: State court decisions *must* stand unless they are unreasonable. The Court unanimously reversed two Ninth Circuit opinions that had overreached this plain standard. See Woodford v. Visciotti, 123 S. Ct. 357

(November 4, 2002) (California courts' rejection of ineffectiveness claim in capital case was reasonable application of Strickland, despite possible disagreement on the merits), and Early v. Packer, 123 S. Ct. 362 (November 4, 2002) (state court's determination that trial judge's comments were improper was neither contrary to, nor unreasonable application of, federal law).

The Third Circuit similarly overreached here. The panel insisted that it was empowered to exercise its own "independent judgment" in reviewing the Mills claim. App. 100 n.15. The court's citation for this standard, however, was from the *dissent* on this point in Williams v. Taylor, 529 U.S. 362, 389 (2000). The court's determination to apply the wrong standard animates its decision to grant relief.

The trial court instructed the jury as follows, in pertinent part, as quoted by the court below:

> The sentence you impose will depend on your findings concerning aggravating and mitigating circumstances. The Crime Code in this Commonwealth provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and *no* mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstance or circumstances.
>
> Remember, under the law of this Commonwealth, your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and *no* mitigating circumstance, or if you unanimously find one or more aggravating circumstances which then outweigh any mitigating

circumstances. In all other cases, your verdict would be life imprisonment.

App. 110-111 (emphasis added).

These instructions do not violate Mills; they contain no requirement that the jurors be unanimous as to the presence of a particular mitigating factor before they can consider it. In fact, if the jury follows these instructions -- and this Court must presume they did so -- then there is no constitutional problem. The jury was directed to proceed in several predictable stages. First, if the jurors unanimously agree that one or more aggravating circumstances have been proved, and they also unanimously agree that no mitigating factors are present, then they must return a sentence of death. If they are not unanimous with respect to the absence of mitigating factors -- that is, if *any* of them believe that one or more mitigating circumstances are present -- the jurors move to the second phase: in other words, if they are unanimous as to the presence of a particular aggravator, then they must weigh this aggravator against "any mitigating circumstances." This is entirely proper, and it does not violate Mills.

The premise of the panel's decision is that the jury could have misunderstood the instructions to mean something they did not say: that the last phrase quoted above, "any mitigating circumstances," might have meant "any *unanimously found* mitigating circumstances," thus leading the jury to ignore any mitigating circumstance that was not "*unanimously found*." But this critical phrase is not there. The instruction, by its plain language, did not impose a unanimity requirement on the consideration of mitigators. The Third Circuit's decision is simply based on speculation that confusion was a *possibility*.

According to the court below, no jurist could reasonably uphold these instructions in the face of a Mills challenge. This is truly a remarkable conclusion, because the Third Circuit has *itself* upheld similar instructions. A decade ago, before the national debate on the death penalty had reached its present intensity, a different Third Circuit panel rejected the theory that the jurors were reasonably likely to understand a comparable jury charge to require unanimity as to mitigating factors. See Zettlemoyer v. Fulcomer, 923 F.2d 284, 308 (3d Cir.), cert. denied, 502 U.S. 902 (1991). The instructions at issue in Zettlemoyer are set out in the margin;[2] even a cursory reading reveals this charge to be nearly identical to the instructions at issue here -- the once-standard

[2] The trial court in Zettlemoyer issued a similar instruction:

> ... If you find that aggravating circumstance [that the murder victim was a prosecution witness] and find no mitigating circumstances *or if you find that the aggravating circumstance which I mentioned to you outweighs any mitigating circumstance you find*, your verdict must be the death penalty.
>
> * * *
>
> ... Under the law, as I said, you are obligated by your oath of office to fix the penalty at death *if you unanimously agree and find beyond a reasonable doubt that there is an aggravating circumstances [sic] and either no mitigating circumstance or that the aggravating circumstance outweighs any mitigating circumstances.*

923 F.2d at 307-308 (emphasis added).

Pennsylvania instructions. The state courts, therefore, could safely assume that the Third Circuit had approved this charge.

Six years later, in Frey v. Fulcomer, 132 F.3d 916 (3d Cir. 1997), cert. denied, 524 U.S. 911 (1998), something changed. As a matter of English structure, the instruction in Frey was the same as the Zettlemoyer instruction; but the panel nevertheless found a way to distinguish the earlier case. The Frey panel employed a "sound bite" analysis, essentially requiring the reviewing court to count the number of words that come between the terms "unanimous" and "mitigating" in any given jury charge. 132 F.3d at 923. In Frey, the panel found the instruction to fail the "sound bite" test, because the words were too close together -- their respective phrases were separated by seven words, rather than the longer seventeen word separation in Zettlemoyer. 132 F.3d at 923.

Whatever the merits of the "sound bite" analysis, it is far from obvious. See Abdur'rahman v. Bell, 226 F.3d 696, 712 (6th Cir. 2000) (rejecting claim that proximity of terms "unanimous" and "mitigating circumstances" could have led to jury confusion), cert. denied, 122 S. Ct. 386 (2001). In fact, even in Frey, the panel recognized that the Commonwealth's contrary analysis was "plausible." 132 F.3d at 924. But now, the panel in this case has gone much further. Frey is no longer merely the supposedly better interpretation of two plausible alternatives – now, according to the Third Circuit, it is the only reasonable conclusion. This cannot be squared with Frey's "plausible" language – let alone with AEDPA's deference provision.

The panel, in its 2001 merits decision, did not discuss Zettlemoyer, or even acknowledge that an earlier Third

Circuit panel had decided a similar case in a contrary way.[3] This is unfair to the state courts. The message is implicit but clear: The panel's decision conflicts with Zettlemoyer, and yet when the state court follows Zettlemoyer-style analysis it is the state court that is "unreasonable."[4] See Abu-Jamal, 2001 WL 1609690 at *120, 126 (despite "linguistically similar" charge in Zettlemoyer, court "compelled to conclude" that relief is required by Banks and Frey).

The Third Circuit's current analysis is wrong. First of all, the panel applied the wrong standard by which to measure jury instructions. While it used to be appropriate to reject jury instructions that *might* be misunderstood, that is no longer the proper test. In Boyde v. California, 494 U.S.

---

[3] The only passing mention of Zettlemoyer in the panel's 2001 opinion appears in a lengthy block quote from Frey; Zettlemoyer is never specifically identified or explained, and no citation is given. App. 113. In its 2003 opinion, the panel cites Zettlemoyer only to note that the Mills retroactivity question was not decided in that case. App. 9 n.3.

[4] The Pennsylvania Supreme Court has repeatedly noted its agreement with Zettlemoyer and its disagreement with Frey. See Commonwealth v. Chester, 733 A.2d 1242, 1256 n.14 (Pa. 1999) (citing Zettlemoyer in rejecting Mills claim; court also observes that Frey failed to apply Teague rule to bar retroactive application of Mills); Commonwealth v. Laird, 726 A.2d 346, 359 n. 12 (Pa. 1999) (same); Commonwealth v. Breakiron , 729 A.2d 1088, 1097 n.7 (Pa. 1999) (noting disagreement with Frey), cert. denied, 528 U.S. 1169 (2000); Cross , 726 A.2d at 337-38 (same; in the alternative, Mills should not apply retroactively).

370 (1990), this Court specifically rejected evaluative inquiries which primarily emphasized the *possibility* of juror confusion, that is, whether reasonable jurors "*could have*" been confused, or whether there was "*a substantial possibility*" that the jury was confused. Id. at 379. The Court in Boyde also rejected standards based on the mere possibility that a *single juror* was misled, rather than the jury as a whole. The Court adopted a more deferential and reliable test: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U.S. at 380. This carefully reformulated standard requires a more significant showing on the claimant's part in order to demonstrate a constitutional violation, as this Court explicitly recognized. See id. ("a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a *possibility* of such an inhibition") (emphasis added); see id. at 387 (Marshall, J., dissenting) ("the majority's reasonable likelihood standard *is not met* where a reasonable juror *could* or *might* have interpreted a challenged instruction unconstitutionally") (emphasis added, internal quotation marks omitted).

Here, the Third Circuit repeatedly invoked a pre-Boyde standard. The panel asked whether the jury "*could have*" interpreted the instructions improperly; the panel also re-introduced the single juror standard, asking whether "*a reasonable juror could* so conclude." App. 112, 116 (emphasis added). This standard is more lenient, with respect to the showing the claimant must make, than the law permits. The panel also cited the correct Boyde formulation, id. at 109, but failed to consistently apply it -- the pre-Boyde standard is repeated again and again. See App. 106 ("the critical question is ... whether a reasonable jury *could have*

interpreted the instructions in an unconstitutional manner") (emphasis added), App. 109 (same), App. 112 (it is "quite possible" that instructions had been interpreted improperly).

The source of the panel's confusion is Mills itself. Mills was decided before Boyde, and in Boyde this Court specifically noted that the Mills opinion offers several improper formulations of the instructional standard: for example, whether jurors "could have" been confused, or whether there was a "substantial possibility" of confusion. Boyde, 494 U.S. at 378. But these standards are no longer correct, and so the Third Circuit was wrong to use them. The underlying issue here, properly framed, is whether the jury instructions, measured by the Boyde standard, raised a reasonable probability that the jury would misunderstand the instructions so as to violate Mills.

Under AEDPA, of course, there is an additional layer of deference: The question for the federal habeas court is not whether the state court was wrong, but whether its decision was at least reasonable. It surely was. The Pennsylvania Supreme Court noted that the instructions "mirror[] the language found in the death penalty statute of our Sentencing Code" and observed that it had upheld substantively identical instructions in Commonwealth v. Hackett, 627 A.2d 719 (Pa. 1993), Commonwealth v. Marshall, 633 A.2d 1100 (Pa. 1993), and Commonwealth v. O'Shea, 567 A.2d 1023 (Pa. 1989), cert. denied, 498 U.S. 881 (1990). The Court had earlier explained that this language did not require jury unanimity with respect to the *presence* of mitigating circumstances, but only regarding the *absence* of mitigating circumstances. Hackett, 627 A.2d at 725. Thus, even if a single juror believed that a particular mitigating circumstance

was present, he or she could weigh it against any aggravating circumstance the prosecution might prove. Id.

The Third Circuit also criticized the Pennsylvania Supreme Court for analyzing the instructions as written, rather than in their likely impact on a jury. App. 109. But that is not a fair criticism. The state supreme court simply noted that the instructions were identical to the language of the Pennsylvania death penalty statute, and observed that it had rejected challenges to similar instructions many times. 656 A.2d at 470. The Court then cited some of these earlier decisions. Id., citing Hackett, 627 A.2d 719, Marshall, 633 A.2d 1100, and O'Shea, 567 A.2d 1023. All of these earlier cases in turn cite Commonwealth v. Frey, 554 A.2d 27 (Pa. 1989), in which the Court had first applied Mills to the standard instructions in greater depth; the Court in Frey had concluded that "individual jurors were free to weigh whatever mitigating circumstances they perceived..." 554 A.2d at 31. It cannot be seriously contended that the state court was obligated to restate the analysis of its earlier decisions over and over again. Yet that is the thrust of the panel's decision.

None of the other circumstances of this case render the state court's decision unreasonable. The panel believed that the verdict slip, on which the jury recorded its decision, somehow increased the possibility of confusion -- but the slip's language exactly tracked the oral instructions. App. 116-118. If anything, the slip *reduced* the possibility of juror confusion. The whole point of the Third Circuit's analysis in Frey, and adopted by the panel in this case, is that, when the jurors *heard* the words "unanimous" and "mitigating" in one "sound-bite," they might have become confused. If the same words are *written down*, however, this is no longer a danger.

On the contrary, where written instructions are at issue, the only question is whether the instructions are ambiguous as a matter of grammatical structure or language. But as a matter of grammar and language, the instructions in this case are identical to the instructions in Zettlemoyer, which the Third Circuit approved a decade ago. Thus, the existence of written instructions renders the state court decision *more* reasonable, not less.[5]

That the Pennsylvania Supreme Court's decision was at least reasonable is also clear from a review of other federal decisions. Many other circuits have rejected Mills challenges to similar instructions and verdict sheets. See, e.g., Scott v. Mitchell, 209 F.3d 854, 874 (6th Cir), cert. denied, 531 U.S. 1021 (2000) (no Mills issue where jurors told "all 12 of you must sign [the verdict form] ... [i]t must be unanimous"); Coe v. Bell, 161 F.3d 320, 338 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999) (instruction that jury must unanimously find aggravating circumstances are not outweighed by any mitigating circumstances does not violate Mills); Parker v. Norris, 64 F.3d 1178, 1187 (8th Cir. 1995), cert. denied, 516 U.S. 1095 (1996) (that verdict form "failed to inform jurors

---

[5] In state court, Banks also claimed that the polling of the jury had created the possibility of juror confusion. 656 A.2d at 470-71. At the end of the trial, Banks requested that the jury be polled; the trial court asked each juror whether he or she agreed with the verdict. In doing so, the court repeated some of the same language used in the instructions and the verdict slip. The Third Circuit agreed with the state court, however, that this jury polling had not made the possibility of juror confusion more likely. App. 119.

that they could consider non-unanimous mitigating circumstances" did not violate Mills); Smith v. Dixon, 14 F.3d 956, 982 n.15 (4th Cir.) (*en banc*), cert. denied, 513 U.S. 841 (1994) (no Mills error where jury required to write "Yes" on the verdict form beside each mitigating circumstance "for which the defendant has satisfied you"); Griffin v. Delo, 33 F.3d 895, 905-906 (8th Cir. 1994), cert. denied, 514 U.S. 1119 (1995) (instruction that jury must unanimously find that any mitigating circumstances outweighed aggravating circumstances did not imply that jury must be unanimous in finding a mitigating circumstance); Lawson v. Dixon, 3 F.3d 743, 754 (4th Cir. 1993), cert. denied, 114 S.Ct. 1208 (1994) (same: court charged that jury must unanimously find that aggravating circumstance or circumstances outweighed "any" mitigating circumstances found); Maynard v. Dixon, 943 F.2d 407, 420 (4th Cir. 1991), cert. denied, 502 U.S. 1110 (1992) (instruction "impose[d] a unanimity requirement on aggravating circumstances and the other elements of the death sentence deliberations, but not ... as to the mitigating circumstances"); Kordenbrock v. Scroggy, 919 F.2d 1091, 1120 (6th Cir. 1990) (*en banc*) (nine of thirteen judges on *en banc* panel rejected Mills claim because there was no express unanimity requirement as to mitigation, and "it cannot be reasonably inferred that silence as to finding a mitigating factor would likely cause the jury to assume that unanimity was also a requirement"), cert. denied, 499 U.S. 970 (1991).

All of these courts have come to the same conclusion: If an instruction requires unanimity in one step of the sentencing process, that does not mean that the jury is likely to be confused about the other steps. The instructions here pass the Boyde test, as the Pennsylvania Supreme Court concluded. This represents -- at the very least -- a reasonable application of Mills.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

THOMAS W. DOLGENOS
Chief, Federal Litigation
RONALD EISENBERG
Deputy District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District
Attorney's Office
1421 Arch Street
Philadelphia, PA
19102
(215) 686-5700

SCOTT C. GARTLEY
(Counsel of Record)
Assistant District Att'y
DAVID W. LUPAS
District Attorney

Luzerne County
District Att'y's Office
200 North River Street
Wilkes-Barre, PA
18711
(570) 825-1692